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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al,
Petitioners,

v.

JAMES JONATHAN MAPP, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States District Court, Eastern District of Tennessee, Southern Division, made and entered in the above entitled cause pursuant to the memorandum opinion entered on November 16, 1973, and/or the affirmance of said opinion of the district court filed by the United States Court of Appeals for the Sixth Circuit on October 20, 1975.

OPINIONS BELOW

DISTRICT COURT

The opinion of the United States District Court for the Eastern District of Tennessee, Southern Division, announced on November 16, 1973, is reported at 366 F.Supp. 1257. The

final order was dated December 18, 1973. On December 26, 1973 respondents filed a motion to amend the Memorandum Opinion and for a new trial and for further relief. Subsequently, on January 7, 1974 said motion was supplanted by an amended motion to amend, for a new trial and further relief. On June 20, 1974, the district court filed a memorandum on pending motions deciding that respondents' motion and amended motion for a new trial and for further relief of January 7, were without merit and should be denied. On July 12, 1974 the respondents' notice of appeal from said denial of their motion was filed in the United States Court of Appeals for the Sixth Circuit. On July 22, 1974 petitioner's notice of appeal from the Memorandum Opinion of November 16, 1973 and the Order of December 18, 1973 was filed in the United States Court of Appeals for the Sixth Circuit.

COURT OF APPEALS

Following briefing and appellate oral argument on April 18, 1975, the appellate court rendered a decision affirming the district court with a dissenting opinion by Judge Edwards.[1] Respondents' "Motion for Rehearing or Rehearing en banc" was filed on November 4, 1975 with an "Amended Petition for Rehearing and Suggestion of Rehearing en banc" being filed on November 24, 1975 pursuant to a grant of an extension of time in which to file having been noted on November 4, 1975. Respondents' amended petition of November 24, 1975 requested the United States Court of Appeals for the Sixth Circuit to delay acting upon respondents' motion for a rehearing until this Court's decision in the case of *Spangler* v. *Pasadena City Board of Education, et al*, 519 F.2d 430 (9th Cir. 5/5/75) cert. granted 11/11/75. (44 U.S.L.W. 3271, 75-164).[2]

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[1] A copy of the opinion of the appellate court of October 20, 1975 affirming the district court is attached hereto as *Appendix A*.

[2] Respondents amended petition of 11/24/75 is attached hereto as *Appendix B*.

BLEED THROUGH

As of the date hereof, the United States Court of Appeals for the Sixth Circuit has not acted upon said Petition by respondents for a rehearing and suggestion of rehearing en banc coupled with a request which is, in effect, a motion to stay the proceeding in the Sixth Circuit in this cause pending a decision by this Court in *Spangler*, supra.

JURISDICTION

The judgment of the district court continuing the injunction to which the respondents complain and thus which is in favor of the petitioner, was entered on November 16, 1973. Respondents docketed an appeal in the Court of Appeals on September 30, 1974 and the petitioner's appeal was docketed on the same day. The Court of Appeals entered its opinion on October 20, 1975, (*Appendix A*). Respondents' petition for rehearing and a suggestion of rehearing en banc filed on November 24, 1975 has not been acted upon. Jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1), providing for the granting of a writ of certiorari upon the petition of any party before or after rendition of judgment by the court of appeals.

QUESTIONS PRESENTED

The questions presented which were correctly resolved by the district court are: Whether a formerly de jure dual school system is under a continuing annual responsibility to assign white children throughout the school system in such a manner as to avoid having any schools with a racial balance disproportionate to the system-wide racial balance where such racial disproportion as now may exist in the system "is not the result of any present or past discrimination upon the part of the Board or other state agency," but "rather is a consequence of demographic and other factors not within any reasonable re-

sponsibility of the Board."?[3] The district court's answer was in the negative.

The second issue correctly decided by the district court is as follows: Whether once a de jure school system has implemented a desegregation plan, as approved by the district court and the court of appeals, with petition for certiorari having been denied by the United States Supreme Court, is there any Constitutional requirement that additional white students received into the school system through annexation subsequent to the District Court order be dispersed throughout the system in order to achieve a racial balance systemwide? The district court's answer was in the negative.

The October 20, 1975 2-1 decision of the court of appeals affirms the district court without any qualifications.

On the appeal by petitioners, the issue incorrectly decided by the district court was: Whether school authorities are constitutionally required to make an effort to counter the actual and continuing withdrawal of white students from the system (and resegregation) by permitting substantially all-black schools when experience within the school system clearly indicates that absent countermeasures a continuing white withdrawal resulting in a substantially all-black school system is a probability. The district court's answer was in the negative.

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[3] *Mapp* v. *Board of Education of Chattanooga*, 329 F.Supp. 1374, 1382 (affirmed 477 F.2d 851) (6th Cir. 1973), cert. denied, 414 U.S. 1022 (1973). As to the Junior High Schools the district court said:

> "Rather, such limited *racial imbalance* as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or *inaction*, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga junior high schools will eliminate "all vestiges, of state imposed segregation" as required by the *Swann* decision."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the equal protection clause to the Fourteenth Amendment to the United States Constitution. There are no statutory provisions involved.

STATEMENT

The Action Under Review Here

This petition seeks to review a judgment of the district court in a school desegregation case where the district court refused to order the submission of a new desegregation plan where two high schools remained substantially all-black in spite of affirmative efforts to desegregate said schools and where subsequent territorial annexation would appear to provide additional white students in the system. Such is the essence of respondents' appeal, Case No. 74-2100. The court of appeals affirmed. The district court's opinion also refused to allow petitioner to amend the previously approved desegregation plan involving decisions based upon race, contiguous busing, pairing, clustering, and racial gerrymandering of zones. The limited amendment was sought by petitioner in order to receive the court's permission to implement changes in the desegregation plan designed to diminish the white withdrawal from the system. The court of appeals affirmed.

Factual Background

On July 22, 1955, the petitioner issued its initial statement of policy with reference to the decisions of the United States Supreme Court of May 17, 1954 and May 31, 1954 on the subject of desegregation in public schools. The opening paragraph of said statement read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools."[4]

The Board immediately undertook a process of elucidation with the formation of an interracial advisory committee.[5]

The elucidation process was continued until this litigation was filed on April 6, 1960. A gradual desegregation plan was approved in 1962 with 16 selected elementary schools being desegregated in September of that year in grades one, two, and three. All dual zones would have been abolished by 1968. At that point in time such was presumed to be compliance with the constitution.

The pace of the desegregation was accelerated pursuant to district court order following a motion for further relief by plaintiffs, filed March 29, 1965. The complete elimination of dual zones in all grades was effected by December, 1966. Subsequent to affirmance by the court of appeals,[6] the only issue remaining was that of faculty assignments until February of 1971 when the district court dismissed a motion by respondents for summary judgment, but set an evidentiary hearing classifying the issues for trial and placing the burden of proof upon petitioners to prove that the actions taken by petitioner met the obligation to establish a unitary school system.

Shortly after this Court's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (4/20/71) in May, the evidentiary hearing was completed and a new desegregation plan was ordered to "maximize integration" requiring for the first time decisions based upon race for the purpose of achieving an adequate constitutional remedy.[7] Initial implementation of the 1971 desegregation plan began

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[4] The complete text of this statement appears as *Appendix C*.

[5] The opening statement to the committee of November 15, 1955 appears as *Appendix D*.

[6] 373 F.2d 75 (1967)

[7] 329 F.Supp. 1374 (1971).

in September of 1971 under the supervision of the district court.

Respondents took an appeal from this decision on the basis that the deviations from a racial balance were unacceptable and unconstitutional. A cross appeal was taken by petitioners contending that remedial measures permitted by this Court in *Swann* were only permissible in a school system found to be in default of its constitutional obligation, and that the petitioner was not in default. Petitioner further contended that the district court opinion in its reference to maximizing integration read the racial balance language in *Swann* as being constitutionally mandatory and not merely "a starting point."

In a 2-1 appellate court decision rendered on October 11, 1972 the case was remanded to the district court. Following a motion for rehearing and suggestion of rehearing en banc by respondents, a rehearing en banc was granted with oral argument taking place on December 14, 1972. On April 30, 1973, 477 F.2d 851, an en banc decision of the court of appeals reversed the 2-1 decision and affirmed the district court's opinion.[8]

In the summer of 1973 and as a result of the experience of two years under the amended desegregation plan, the petitioner, having experienced substantial white withdrawal of students from the system, conducted a careful evaluation of the system, the possible causes of the withdrawal from the schools, and a projection of the possible impact upon the system of additional busing projected for full implementation. Recognizing the probable constitutional obligation upon a Board to avoid inaction which might contribute to resegregation, petitioner, on July 20, 1973, filed a Motion for Further Relief: to Adjust Amended Plan of Desegregation, as filed June 16, 1971. An extended evidentiary hearing was held in October of 1973 in which the actual experience of the petitioner in September of 1971, September, 1972, and September, 1973

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[8] 477 F.2d 851, with Judge Weick and O'Sullivan dissenting and with a separate concurrence by Judge Miller.

was presented to the court, as well as the petitioner's plan for attempting to counter the white withdrawal reflected by the statistical data for the three years in question.

In rebuttal, respondents offered testimony with reference to the probable impact of the completion of annexation (then imminent) of certain areas contiguous to the Chattanooga system with said areas being populated predominately by white students.

Petitioner's motion to amend the plan was denied in an opinion, which is the subject of this appeal, entered on November 16, 1973. In this opinion specific guidelines were provided petitioner as to the creation of zones with reference to annexed schools and the adjustment of zones within the system and further providing that any such creation or adjustment of zones would be required to be submitted to the federal court 30 days prior to their effective date.

However, respondents filed a motion to amend the Memorandum Opinion of November 16, 1973 and for a new trial and for further relief on December 26, 1973, supplementing said motion with an amendment on January 7, 1974. Following the district court's denial of this motion as amended on June 20, 1974 respondents filed a notice of appeal on July 12, 1974 requesting a complete new desegregation plan for the Chattanooga system. Petitioner's appeal was filed on July 22, 1974. Both cases were docketed on September 30, 1974. For a more complete statement of the facts from July 1955 forward, see *Appendix E* attached hereto.

The appellate oral argument was held on April 19, 1975 with a 2-1 decision affirming the district court without qualification on October 20, 1975.[9] Thereafter, the respondents filed "Motion for Rehearing or Rehearing en banc" on November 4, 1975, followed by a "Amended Petition for Rehearing and Suggestion of Rehearing en banc" on November 24, 1975,

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[9] Appendix A.

pursuant to a grant of extension of time in which to file said amendment, having been noted on November 4, 1975.[10]

In the interim between the filing of the original motion for rehearing and the filing of the petition for rehearing, this Court granted certiorari in the case of *Pasadena City Board of Education, et al.* v. *Nancy Anne Spangler, et al.* and *United States of America*, No. 75-164, on November 11, 1975.

In the amended petition of November 24, 1975 respondents brought to the attention of the court of appeals the second question presented in the Petition for Writ of Certiorari filed on behalf of the Pasadena City Board of Education which reads as follows:

> "2) Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which it is in no way responsible? *Id.*, at 3271."

The respondents went on to suggest that this Court's decision in *Spangler* might clarify the language of *Swann* with respect to the need for "year to year adjustments" and provide guidance to the court of appeals in re-evaluating its decision in the Chattanooga case. In the conclusion to their petition of November 24, 1975 respondents went on to request that any action upon their motion for rehearing be stayed, pending the Supreme Court's decision in *Spangler*, supra.

Upon receiving notification on November 11, 1975 of the action of this Court in granting certiorari in *Spangler*, petitioner's counsel requested and received a copy of the Petition for Writ of Certiorari filed on behalf of the Pasadena School Board. Following an analysis of this petition, petitioner sought and received permission from counsel in the *Spanger* case to file an amicus curiae brief in that case. Such brief was filed in the last week of December.

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[10] Appendix B.

REASONS FOR GRANTING A WRIT

1. The Pasadena Case

The action by the respondents in introducing the *Spangler* case into the instant litigation reflects a decision upon the part of counsel for respondents to the effect that certain issues presented in the *Pasadena* case may well be equally applicable to the issues in the *Chattanooga* case to the point that a decision in the *Pasadena* case could be determinative of one or more issues in the *Chattanooga* case. A decision in the *Spangler* case could result in guidelines such as to provide a basis for the United States Court of Appeals for the Sixth Circuit reaching a decision adverse to that of the petitioner upon the petition for rehearing now pending in that court. In this posture this Court could appear to have adequate reasons for denying any subsequent petition for writ of certiorari which might be submitted by petitioner in the event of an en banc reversal of the October 20, 1975 decision of the three judge court affirming the district court in the *Chattanooga* case. In deciding upon new guidelines, petitioner submits the Chattanooga facts could be of compelling significance to this Court.

2. Experience Indicates The Need To Amplify The Swann Guidelines

This Court made the following statement in *Swann*, supra at page 14:

> "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, *however incomplete and imperfect*, for the assistance of school authorities and courts." (Emphasis added)

Petitioner interprets the above language as indicating an awareness upon the part of this Court that the language in *Swann* would be interpreted by various school boards, their

counsel, district courts, and appellate courts as guidelines in designing an adequate constitutional remedy. These guidelines would be generally applicable, but would have to be applied to the specific factual situations under consideration. That the guidelines of *Swann* were not final guidelines, but might possibly need further amplification is clearly evident from the language this Court used in the above quotation from *Swann*.

There is now abundant evidence that the guidelines of *Swann* are incomplete and imperfect, as interpreted by the district courts and courts of appeals. Five years has provided school authorities and their counsel, district courts, and appellate courts with a great variety of experience in attempting to apply the guidelines of *Swann* to the school system throughout this country.

Illustrative of the wide variation in interpretations of the guidelines of *Swann* is the following. In the case *of Goss, et al* v. *The Board of Education of the City of Knoxville, Tennessee*, 444 F.2d 632 (1971), at page 636 the *Mecklenburg* pattern was referred to as "legally tolerable" reflecting an interpretation by appellate jurists that the remedies reflected in *Swann* were *permitted* as contrasted with being *commanded*. However, there is abundant evidence of decisions by district and appellate courts clearly reflecting their hesitation at approving any plans where there is any substantial deviation from a racial balance; and this in light of this Court's strong language in *Swann* referring to the necessity of a reversal of Judge McMillan should his opinion be read as an interpretation that a mathematical racial balance was a constitutional requirement; and further, that a racial ratio was only to be used as a starting point.

The "legally tolerable" interpretation is to be contrasted with the decision of Judge Real in *Spangler* where the net effect of his opinion is to make a mathematical ratio a constitutional requirement in the sense that he condemns a ma-

jority of a minority school under any and all circumstances during his lifetime.[11]

It must now be obvious that in school systems where the facts are different, different remedies are required. To illustrate, if a school system is majority black or is in that vicinity, remedies in such school system must be different from a school system where the black minority percentage of the total school population is small or less than twenty-five percent. Judge Real is not the first district judge to condemn a majority of a minority school out of hand as unconstitutional. Nevertheless, in the Chattanooga system, where there was a majority black population at the time of the district court opinion under consideration, there is no way that a majority black school could be avoided. Thus, a majority black school is unconstitutional in California, but it is constitutional in Chattanooga.

The above certainly raises a question as to the conflict between the Sixth Circuit's interpretation of this particular part of the *Swann* guidelines and that of the Ninth Circuit as is implicit in that circuit's affirmance of Judge Real's decision in *Pasadena*. There are distinguishing facts between *Pasadena* and *Chattanooga*. It is possible that these facts might support and explain what appears to be a contradictory application of the constitution. However, such is pure speculation, absent any clarification by this Court as to the applicability of mathematical ratios to different school systems.

3. Apparent Conflict Between The Eighth And The Sixth Circuits — Omaha.

There also is a conflict between the Eighth Circuit's interpretation of *Swann* and that of the Sixth Circuit. Such is evidenced by the decision of the Eighth Circuit in *U.S.A. and*

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[11] *Spangler*, supra, p-440 — "Prospectively, I reject the edict that there shall never be a particular school with a 'majority of any minority' or a majority of any minority so long as '[the district judge] live[s].'"

Webb, et al v. *School District of Omaha, et al,* 521 F.2d 530, decided on June 12, 1975 with rehearings denied on July 7, 1975, in which this Court denied certiorari on November 11, 1975, 44 U.S.L.W. 3273, No. 75-270. In reversing the district court, the court of appeals remanded to the district court with instructions to take specific steps in order to gain compliance with the constitution.

By these instructions, the Eighth Circuit ruled as a constitutional matter that if a school had black enrollments between 5% and 35% such was to be considered integrated and, by implication, constitutionally correct. Secondly, where the black enrollment was presently below 25%, the Eighth Circuit specifically prohibited the operation of the plan increasing the black enrollment above 25%. The court pointed out:

> ". . . This policy will discourage the labeling of addtional schools as 'black,' will hopefully discourage 'white flight,' and will further integration in the district."

Thirdly, the court went on to say that where the ratio of black to white students at schools which presently have a black enrollment between 25% and 35%, such ratios were not to be significantly increased by operation of the plan, "and in any event, the outer limit shall be set at a level not to exceed 35% black enrollment."[12] And last, in any school where the black enrollment exceeded 35% such was to be altered so that the black enrollment at such schools drops to a level not to exceed 35%.

The testimony in the *Chattanooga* case in October, 1973 was essentially that experience with a substantial proportion and number of schools, over a significant period of years indicated that when the black enrollment in a formerly white school approached 35% it could be expected that the black enrollment in that school would increase radically after reaching the 35% point, and that the school would become virtually

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[12] *U.S.A.* and *Webb,* supra, p. 547.

all-black in a short period of time. The fact that this has been the actual experience in the Chattanooga School System was well known in the community, thus contributing to the withdrawal of white students in schools where the black enrollment appeared to be approaching thirty-five percent. The district court found that this threat was not sufficiently significant to justify a school board, in designing and implementing a plan where black enrollment would be limited to 35%, for the reason that in Chattanooga this would require the continuation of some substantially all-black schools.[13] Thus, it is against the Constitution to have more than 35% black students in any school in Omaha while this is not true in Chattanooga. Again, this can be justified perhaps on the basis of the varying facts. Nevertheless, the court of appeals in Omaha took a completely different attitude toward the introduction of evidence with regard to white flight than did the district court judge in the *Chattanooga* case.[14]

4. Apparent Conflict Between The Sixth and The Fifth Circuits – Atlanta.

And in the area of white flight there is a conflict between the Sixth Circuit and the Fifth Circuit as represented in the case of *Ca'houn, et al* v. *Cook, et al,* decided on October 23, 1975, 522 F.2d 717, involving the Atlanta School System just over 100 miles from Chattanooga. Here was a system that

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[13] *Mapp,* 366 F. Supp. 1257, "The difficulty with the Board's entire position, simply stated, is that it is based upon a mistaken legal premise."

[14] *Mapp,* Supra, p. 1260 "The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining de jure segregation. Concern over 'white flight,' as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value."

was *70% white* at the initiation of the litigation, but now is *85% black*. According to the opinion, the principal objective of the plan which had been in operation for two years was "to achieve at least 30% black enrollment in every majority white school in the system . . ." Appellants appealed because the system had never utilized non-contiguous pairing and had never bused white children into predominately black schools. And even though 92 out of 148 schools in the system were over 90% black, the appellate court affirmed the district court's approval of the plan in operation. The court recognized the impact of white flight when it said:

> "Today hindsight highlights the resulting erosion, revealing that every judicial design for achieving racial desegregation in this system has failed." (Page 718)

Forces beyond the power of the government and the judiciary produced the failure — an obvious practicality. As the Atlanta School Board was successful in this litigation at the appellate level, it is our understanding that they do not intend to appeal. We also understand that the plaintiffs in that action also do not intend to appeal and we can understand why. Nevertheless, the holding in the *Atlanta* case recognizes principles, constitutional and otherwise, that were considered to be irrelevant and immaterial in the *Chattanooga* case particularly in the area of the recognition and relevance of the withdrawal of white students in the system during the course of implementing a desegregation plan based upon decisions being made with regard to race.

5. Need To Minimize Desegregation Litigation

Extensive, protracted school desegregation litigation is detrimental to public education and is burdensome upon the federal court system. Clarification of the nature of the obligations of school authorities will assist school authorities in knowing what the Constitution requires of them.

School authorities must make the initial decision as to

the specifics of a desegregation plan. Such requires legal interpretations by counsel for such school authorities. If school authorities have a better idea of what the law requires, the possibility of approval by the district court is enhanced, thus minimizing the time requirement in the presentation of evidence as well as the possibility of a need for any appeal. Uncertainty and confusion as to what *Brown I* and *II*[15] and their progeny require has made decisions to appeal the normal pattern since the district court orders have usually met with substantial resistance. Appeals have been in order for otherwise the school authorities' constituents would claim that their rights had not been adequately represented. School authorities necessarily represent diverse and conflicting interests.

6. General Principles Have Proven Ineffective.

Dual zones were at one time the means of maintaining a segregated school system; and the constitutional command then was understood to require school authorities to cease and desist making decisions upon the basis of race. Decisions should be made "without regard to race."[16] Affirmative actions were introduced in *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430. Compliance was described in various phrases such as "a racially nondiscriminatory school system", page 435, 437; "a unitary, nonracial system," page 436; "a system of public education freed of racial discrimination," page 436; "a unitary system in which racial discrimination would be eliminated root and branch," page 438, the removal of the vestigial remains of a dual school system, the elimination of racially identifiable schools. Time,

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[15] *Brown* v. *Board of Education of Topeka,* I 347 U.S. 483 (1954), II, 349 U.S. 294 (1955).

[16] The Respondents' Motion for Further Relief of March 27, 1965 described the relief requested to include student assignments "without regard to race". p. 1, Vol I, Joint App. U.S. Court of Appeals for the Sixth Circuit, Nos. 71-2006 and 71-2007, 477 F.2d 851 (1973).

the variety of factual situations, as well as the diversity of responses by school authorities have caused such directives to be of minimal assistance to school authorities trying to apply such general language to their own specific facts.

Courts have examined student racial statistics as the practical test to reach a determination, perhaps because of the complexity of evaluating other proof offered. Mathematical formulas have become the test of an adequate constitutional remedy with causation often ignored. The *Pasadena* case is illustrative of this development.

School authorities and district courts are desperately in need now of more specific guidelines if they are to perform their respective legal responsibilities. While general principles are useful, the essential role of the facts unique to each case should be emphasized, for otherwise each school board could be deprived of its day in court and its right to due process including the appellate process, as its own response to *Brown I* and *II* based upon the facts unique to its school system is considered and judged constitutional or not. District and appellate court decisions from every circuit reveal the need for clarification.

7. Continuing Default As A Basis For Continuing Judicial Supervision

Swann, supra, made it clear that judicial authority in desegregation cases was present only where the facts reflected a default upon the part of school authorities.[17] The net effect

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[17] "Judicial authority enters only when local authority defaults." (p. 16).

"• • • that the School Board had *totally defaulted* in its acknowledged duty to come forward with an acceptable plan of its own. • • • It was because of this *total failure* of the school board that the District Court was obliged to turn to other qualified sources • • •." (Emphasis ours) (p. 24).

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only* on the basis of a constitutional violation. Remedial

of the respondents' petition in the court of appeals is to impose a completely new desegregation plan upon the Chattanooga system, as a constitutional requirement, at a point in time where CBE has been held to be in compliance by the district court, which judgment has been affirmed by the majority opinion in the court of appeals. How is it possible to justify seeking a completely new plan when the district court's own factual finding says there is no default?

From default to compliance to dissolution of the injunction and termination of continued court supervision, is a long road with a multiplicity of temporary way stations along the way. Responses of school authorities to *Brown I* and *II* have revealed infinite variety. Uncooperative, stubborn, recalcitrant boards appear to have much in common with the *Swann* facts. But all boards are not in this category. Default which continues by design, apparent or otherwise, may merit a judicial response such as *Swann* reveals. But is it "default" when the condition continues in spite of every effort to remedy default and continues only because a board fails to predict what the constitution requires?[18] School authorities

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judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults." (Emphasis ours) (p. 16).

"* * * to review important issues as to the duties of school authorities and *the scope of powers of federal courts* under this Court's mandates to eliminate racially separate public schools established and maintained by state action." (Emphasis ours) (p. 5).

[18] *Mapp* v. *Board of Education*, 341 F. Supp. 193, 200 — "This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protective Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court."

in this category in all justice should not receive the same radical treatment as *Swann* produced; and particularly when time now indicates the racial decisions and measures used in *Swann* do not produce the desired result.

Clarification of the default concept as described in *Swann*, would be of such vital importance to the nation that the public interest requires that this Court authoritatively confirm the judgment of the district court and the majority opinion of the court of appeals now subject to a petition to rehear.

8. State Action

There is a need for this Court to reaffirm the salient character of state action as a *sine qua non* to a finding of unconstitutional racial school segregation. It might be thought that this Court had been amply explicit on this principle.[19] The opinion of

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[19] *Green*, supra, included the following:

> ". . . the State acting through the local school board and school officials, organized and operated a dual system, . . . page 435.
>
> "in the context of the State-imposed segregated pattern . . ." page 432.
>
> ". . . then operating State-compelled dual systems . . ." page 432.
>
> ". . . toward disestablishing State-imposed segregation." page 439.
>
> ". . . for dismantling the State-imposed dual system . . ." page 439.
>
> ". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.
>
> "A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

The opinion in *Swann*, continues such requirement without any hint of qualification:

> "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially

Judge Real in *Spangler*, supra, makes it clear that the district court considered a majority of any minority school to be unconstitutional without any reference to causation.[20] Nothing in the opinion sheds any light upon what factors operated to alter the student enrollment at these schools from majority white to majority black. That the district judge did not see fit to make any reference to state action as the causative factor must reflect that he considered such irrelevant. Consequently, such provides a basis for alleging that district courts are inclined to ignore consideration of two basic elements in the equations — state action and causation.

A survey of representative district court and appellate court opinions will confirm such trend.

But the district court in the *Chattanooga* case ignored neither state action nor causation. Both were specifically identified and their absence was a primary support to the decision

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separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

[20] ". . . so, at the time of hearing of this matter in March of 1974 five Pasadena schools were and remain in violation of the no majority of any minority injunction in this Court's January, 1970, ruling." 375 F.Supp. 1304, 1306.

and the affirmance.[21] The present situation on this issue remains seriously confused to the detriment of all parties and,

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[21] *Mapp*, supra, 329 F. Supp. 1374 (1971) —

> "With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board." (p. 1382)
>
> "To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency." (p. 1383).
>
> "In light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendant's plan for desegregation of the Chattanooga Junior High Schools would eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision." (p. 1384)

In giving final approval to the high school plan in 1973, Judge Wilson had this to say:

> "However subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto*

above all, in conflict with the basic welfare and interest of the nation in the maintenance of the highest level of educational opportunity for all.[22] It is imperative that this Court flatly

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conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become causative factors for the present racial composition of the student body in those schools (Riverside and Howard) and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the Plan previously approved included provision for students to elect to transfer from a school in which they were a majority to a school in which they would be in a minority." 366 F.Supp. 1257 (11-16-73, at page 1261)

The majority opinion of the court of appeals quoted from this portion of Judge Wilson's opinion and then had this to say:

"While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board." (App. 3a, 4a)

The Sixth Circuit affirmed Judge Wilson and in doing so clearly found that the district court's actions complied with the Constitution. Such is reflected in the following quote:

"Having implemented the plan for desegregating the high school by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, having provided further for continuance of a majority to minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka, II*, 349 U.S. 294 (1955) *Brown II* and more particularly of *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we." (App. 5a)

[22] As this Court said in *Brown I*, supra, p. 493 —

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most

confirm the judgment of the district court in 1971 and in 1973, and the appellate court as to the essential role of state action as a cause of racial segregation in order to establish any violation of the Fourteenth Amendment.

9. Year To Year Adjustments

The closing portions of *Swann* looked forward to the need for "year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Page 32.

If the volume of school desegregation litigation is to decrease at any time in the near future, "when and under what circumstances" it is appropriate for a district court to relinquish jurisdiction of school desegregation must be clarified for school authorities and district courts.[23] This involves more specific guidelines as to what constitutes both (1) the accomplishment of the affirmative duty to desegregate; and (2) the elimination of "racial discrimination through official action."

The respondents persist in their efforts to eliminate the "official action" element from consideration. The current push for a completely new desegregation plan for Chattanooga is

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basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[23] FOOTNOTE 1. In *Spangler*, supra, 519 F.2d 430, p. 431:

"We note that one of the basic legal issues presented by this appeal, the question of when and under what circumstances a school district may compel a federal district court to relinquish jurisdiction and end its supervision has not yet been directly addressed by any courts of appeals or by the United States Supreme Court."

consistent with this objective. The respondents are blind to the flat holding by the district court that any objectionable racial imbalance remaining was caused by factors "not within any reasonable responsibility of the board." That the affirmative duty had been accomplished was recognized, explicitly by the court of appeals in its affirmance.[24]

Any realistic comprehension of the applicability of the year-to-year adjustment guidelines set forth in *Swann* compels a careful structuring of a concept including the elements of default, state action, causation, the burden of proof, racial imbalance, affirmative action, and practicalities.[25] However, if we

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[24] "Having implemented the plan for desegregating the high schools by establishing attendance zones which were designed to achieve a substantial degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) (*Brown II*) and more particularly of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *So do we.* Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio and yet another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector *which persisted after curative action* had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> 'Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some school.' *Swann* v. *Board of Education, supra,* 402 U.S. at 23." (Emphasis added) (App. 5a, 6a)

[25] *Davis* v. *Board of Commissioners of Mobile County,* 402 U.S. 33 (1971) p. 37:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of desegregation, *taking into account the practicalities of the situation.*" (Emphasis Added)

should consider numerical results as the sole criterion for constitutionality, then state action, causation, and the burden of proof are excluded from further consideration. Such is the approach the respondents are urging upon this Court. But there is no means known for excluding practicalities. Brutal experience in too many school districts serves as constant reminders of the intransigence of human nature as well as the continuing reality of the consent of the governed. As this Court said in *Swann*, "We are concerned . . . not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds . . . One vehicle can carry only a limited amount of baggage." page 22.

But practical limitations appear to be the last in the order of elements to consider. The analysis starts with an allegation of racial segregation. The second step is to identify the presence of official action. If such is absent the inquiry terminates. But if official action is present then the proof must be examined in order to ascertain causation. Are there reasonable grounds for finding that the segregation was caused by the board's action or inaction? If the answer to the question is in the affirmative, then we must proceed to find out if the board has undertaken affirmative action in order to remedy the unconstitutional segregation. If there has been no affirmative effort, such a board is in default and a desegregation plan is mandatory. On the other hand, if the proof reveals affirmative action, then such a board is not in default and we move to an examination of the results of such affirmative action. If these results are less than satisfactory, as is true in the *Chattanooga* case, the character of the affirmative effort should be subjected to careful scrutiny. If the proof shows that such effort was reasonably designed and implemented with an honest effort, has not such a board met its Constitutional obligations under *Brown I* and *II*?

And in this context the practicalities must be given weight. Does a board remain in the posture of default under such circumstances? Does default continue when all alternatives have been exhausted?

Boards throughout the nation are at various points along the roadway to complete compliance. A decrease in the burden of desegregation litigation argues for this Court to speak upon the question of when and under what circumstances a school district may compel a district court to relinquish jurisdiction and end its supervision.[26]

The national interest suggests the immediacy of clarification on this point.

10. Fixed Mathematical Racial Balance

While the facts in *Swann* were unique to Charlotte, the constitutional guidelines contained in *Swann* have been made applicable to 16,400 public school districts in the nation, serving the needs of more than 45 million public school children.[27] Legal advisors to school authorities necessarily have made a critical comparison of the facts in *Swann* with the facts in their client school district. Thereafter, the guidelines of *Swann* were interpreted as applicable to a specific factual setting. The *Swann* facts indicate clearly that Judge McMillan considered the school board members recalcitrant and uncooperative perhaps bordering upon bad faith.[28] To what extent did this factor influence the district judge in the exercise of his broad and awesome equitable discretion?

This Court acknowledged the possibility that it was Judge McMillan's opinion that a "fixed mathematical racial balance" was a substantive constitutional right, going on to say that

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[26] Footnote 1, in *Spangler*, supra.

[27] According to the Tennessee Education Assn. Research Bulletin, 1975, R-5, page 3-5, in 1974 there were 16,400 basic public school administrative units serving 45,074,141 school age children. (Those school districts not having any racial minority within their jurisdiction would be excluded.)

[28] *Swann*, supra, 311 F.Supp. 265 (1970) page 269:

> "14. That the defendants report to the court *weekly* between now and May 15, 1970, reporting progress made in compliance with this order; . . .' (Emphasis Added)

if the district court's holding was to be read as reflecting such a requirement ". . . that approach would be disapproved *and we would be obliged to reverse.*" *Swann,* supra, page 24 (emphasis added).

In the face of this cautionary language, a review of lower court opinions since April of 1971 will reveal constant references to racial balance, followed by reasoning and rulings reflecting extreme reluctance to approve *any* plan which deviated from a racial balance unless there were *convincing* facts available to provide constitutional support for such deviation in the area of causation.

Certainly any survey of post-*Swann* decisions would reveal the fact that the burden of proof has been placed upon school authorities to convince the trial judge that something less than a racial balance can be constitutional. And the benefit of the doubt has been given to the arguments of plaintiffs.

And now we have Pasadena. District Court Judge Real considered the Pasadena Board to be uncooperative, relating in his opinion that the current President of the Board of Education pledged to "Stop Forced Busing" in an unsuccessful attempt to be elected to the Pasadena Board in a recall campaign in April of 1970.[29] That Judge Real had substantial disdain for the Pasadena Board is evident from language in his opinion.[30]

Contrast this with excerpts from the opinions of District Court Judge Wilson in the *Chattanooga* case, *Mapp,* supra, 329 F.Supp. 1374, 1389:

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[29] *Spangler,* supra, 375 F.Supp. 1304, 1306. Also see Footnotes on the same page.

[30] ". . . it takes little educational expertise to recognize that the Pasadena Plan has not had the cooperation from the Board that permits a realistic measurement of its educational success or failure. No one can now estimate the possible results of the Pasadena Plan had it enjoyed the continued support of a Board who would act, as they profess, to 'do unto others as you would have done unto you.'" *Spangler,* supra, p. 1308.

"A school system that has voluntarily placed a black staff member in charge of teacher recruitment and assignment needs no Court-imposed restrictions on potential forms of faculty discrimination which the record clearly and affirmatively shows it does not practice.

"Moreover, the evidence does not indicate that such discrimination is now being practiced within the Chattanooga School System, but rather bears out the testimony of the defendants' witnesses that all such practices have heretofore been eliminated.

"Moreover, the evidence is undisputed that the defendants have heretofore administered their previous transfer plan in a manner that was wholly free from racial or other discrimination.

And then compare the following language in *Mapp*, supra, 341 F.Supp. 193, 200-201 (1972):

"This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, *the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court.* Accordingly, it has never been necessary for this Court to direct that outside persons or agencies, such as the United States Department of Justice or the United States Department of Health, Education, and Welfare, enter into the lawsuit in aid of the development of a lawful plan of

desegregation or in aid of enforcement. As recently as in its opinion entered upon July 26, 1971, the Court had this to say:

> 'The wisdom and appropriateness of this procedure (i.e., looking to the School Board for the development of a desegregation plan) is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and the School Board to come forward with a plan that accords with the instructions of the Court and its order of May 19, 1971, and with the appellate guidelines therein cited.'" (Emphasis added.)

It is basic to our system of jurisprudence to give opinions of the trial court the benefit of every reasonable doubt prior to reversing a decision. And petitioners agree without reservation.

However, since any decision by this Court in *Pasadena*, supra, may be interpreted to decide a principle applicable to the 16,400 other basic school administrative units in our land, the potential for injustice and unequal treatment cannot be ignored when the constitutional guidelines in question evolved from a fact siuation where the school authorities involved were considered by the district court judge to border upon bad faith. Decisions applicable to recalcitrant boards, could be fraught with unjustice when applied to school authorities making every effort to comply with the Constitution.

There are 154 metropolitan school systems in our nation, each with a total population of in excess of 100,000 people. Each community is unique. The school authorities in each each of the 154 communities possess a combination of characteristics peculiar to their community. Their individual response to *Brown I* and *II* is as varied as the communities. Guidelines emanating from the response of a recalcitrant school board could well prove a calamity for many urban school systems which have made and are making a valiant effort to understand the complexities of urban life while striving to give reality to the ideals reflected in *Brown I* and *II*.

11. The National Interest

Petitioner submits that the above clearly indicates that the national interest requires the prompt settlement by this Court of the grave constitutional questions involved in this case. It is for this reason that petitioner seeks review by this Court of the judgment below in their favor before action by the court of appeals on the pending petition for rehearing. A similar procedure was followed in *Griffin* v. *County School Board of Prince Edward County*, 375 U.S. 391; *Brown* v. *Board of Education*, 344 U.S. 1; *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Richert Rice Mills* v. *Fontenat*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

IMMEDIATE HEARING

It is safe to assert that the ultimate question presented by this case is of vital importance to the 154 metropolitan public school systems in this country.

Petitioner is prepared to file briefs on the merits promptly following any grant of certiorari. (The case has already been extensively briefed in the district court and the court of appeals.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

(1) This petition for a writ of certiorari should be granted.

(2) That this case should be set down for argument prior to a decision in the *Spangler*, supra, case.

Respectfully submitted,

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January 30, 1976

APPENDIX A

Nos. 74-2100 and 74-2101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants (74-2100),
Plaintiffs-Appellees (74-2101),

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al.,
Defendants-Appellees (74-2100),
Defendants-Appellants (74-2101).

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 7a-17a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed imple-

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

mentation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over 'white flight', as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners*, 391 U.S. 450 . . . :

> "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.'" *Brown II* at 300, . . .

"Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia*, 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II*, 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education*, 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971).

The in banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee,* 477 F.2d 851 (6th Cir.), *cert. denied,* 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga,* 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp.* v. *Board of Education of the City of Chattanooga,* 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.
>
> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school sys-

tem was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied it. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial pro-

ceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to

whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.

To the extent that the Court has previously given only tentative approval to the high school zoning plan, final

> approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
>
> *Mapp* v. *Board of Education of the City of Chattanooga,* 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968).

Defendant-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent, then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron*, *supra*, at 7; *Bradley* v. *School Board*, 382 U.S. 103; cf. *Watson* v. *City of Memphis*, 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminnate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154. Compare the remedies discussed in, *e. g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241;

> In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U.S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U.S. 683, 689. See *Calhoun* v. *Latimer,* 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*
>
> *Green* v. *County School Board of New Kent County, supra* at 437-39.

At the outset we note that we deal with a school district which at the time of the beginning of this litigation was clearly and concededly a dual school system segregated by race according to state statute. We therefore are required to determine whether or not a public school system (racially constituted during the 1973-74 school year as follows) can be held by this court to have been desegregated "root and branch":

United States v. *Crescent Amusement Co.,* 323 U. S. 173; *Standard Oil Co.* v. *United States,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232-234.

	White	Black	% White	% Black
Howard	10	999	1	99
Riverside	3	721	1	99
Chattanooga	439	330	57	43
Brainerd	646	404	61	39

There can, of course, be no doubt that Howard and Riverside High Schools are "racially separate public schools established and maintained by state action." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5 (1971). Both were built as Negro schools under state law which required a dual school system. T.C.A. §§ 2377, 2393.9 (Williams 1934). Twenty-one years after decision of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), both high schools (encompassing 60% of the black high school population of Chattanooga) are still (and always have been) essentially 100% black. As to these schools and students, there has been no desegregation at all.

Defendants-Appellees contend that two measures which they took should be accepted as the equivalent of desegregation. They are: 1) the inauguration of a freedom of choice plan, and 2) a change in zone boundaries which was calculated (it is claimed) to introduce 25% of white students into both high schools. Defendants-appellees freely admit that neither measure was effective in changing the segregated character of the Howard and Riverside High Schools.

At to the freedom of choice plans, the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact. *See Green* v. *County School Board of New Kent County, supra; Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968).

Defendants-appellees' strongest reliance is upon the second contention that they "zoned" 25% white students into Howard and Riverside but that the white students thus assigned avoided the assignment by "white-flight." As to this measure, we have

no findings of fact concerning defendants-appellees' contention. But if we assumed their truth, we clearly would not have exhausted the possibilities for successful desegregation nor satisfied the constitutional command. Many possibilities for desegregation remain, including pairing of white and black schools and high school construction which would make desegregated zones more feasible. In any instance, the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 15-21; *Brinkman* v. *Gilligan,* — F.2d — (6th Cir. 1975) (Decided June 24, 1975, No. 75-1410).

In my judgment the case should be affirmed as to the grade schools and junior high schools. The judgment should be vacated and remanded as to the high schools. All other issues presented by either party should be summarily denied.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,
Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District of Tennessee

AMENDED PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Plaintiffs-Appellants, by their undersigned counsel, respectfully pray that, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, this Court enter its order granting them a Rehearing and Rehearing *En Banc* in this case, and, in support thereof would respectfully show the Court as follows:

1. Numerous decisions of the Supreme Court and of this Court (previously cited in our original petition for rehearing amended hereby) have established that school boards have a constitutional duty to eradicate vestiges of their dual system "root and branch" and to implement plans that will "work

realistically and work realistically now" to achieve that end. Furthermore, the same decisions have emphasized that a school district's compliance with the requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and its progency must be judged by results not promises nor projections. They have stressed that where a board fails using one approach to achieve desegregation, it can satisfy its constitutional duty only by resorting to other feasible, viable and judicially-approved techniques to achieve "the greatest degree of actual desegregation."

2. As the facts clearly establish in this case, the Chattanooga Board of Education has *never* altered the one-race, dual character of its high schools. The four high schools at issue here were one-race facilities under the dual system and remain so today. The Board's freedom of choice and geographic zoning plans have glaringly failed to alter the racial compositions of these schools. Nevertheless, it has eschewed, with lower court approval, any reliance upon other judicially-approved remedies such as pairing, clustering, transportation or alteration of feeder patterns from lower grades to the high schools that have proven effective in other districts in satisfying constitutional requirements.

3. This Court has established, by affirming the trial court's approval of a plan that fails to do the job *Brown, supra* mandates, the principle that a board can achieve unitary status without making *any* appreciable change in the character of its schools from their one-race composition under state-imposed segregation. It has given its judicial seal of approval to the proposition that demographic changes and "white flight" can, absent any meaningful desegregation of the system as a result of school board action, convert a dual system to a unitary system.

4. With all due respect, we submit that this Court has, in so doing, violated the spirit and letter of the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) where it stated:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate* has been *accomplished and racial discrimination through official action is eliminated from the system. Id,* at 32. [Emphasis added]

We suggest that the foregoing language from the *Swann* decision reflects the Supreme Court's view that *something* must happen – meaningful desegregation – before a system can be declared unitary and the need for "year-by-year" adjustments and judicial oversight ceases. Until meaningful desegregation occurs, year-by-year adjustments may be necessary, the Court seems to envision. Yet this Court has rejected such an approach in this litigation.

5. The issue decided by this Court is presently before United States Supreme Court in the case of *Pasadena City Board of Education* v. *Spangler,* No. 75-164 *cert. granted* 44 U.S.L.W. 3271 (November 11, 1975). One of the questions presented there is as follows:

> (2) Is school system required to amend its judicially validated desegregation plans to accommodate for annual demographic changes for which it is in no way responsible? *Id,* at 3271.

We respectfully suggest that the Court's decision in the *Spangler* case should clarify the language of *Swann, supra* with respect to the need for "year-by-year" adjustments and provide guidance to this Court in reevaluating its decision in this litigation.

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for rehearing be granted and that the suggestion of

rehearing *en banc* be duly considered in light of the apparent conflict in this Court's decision with the principles of *Swann, supra.* Furthermore, we request that any action on this petition be stayed pending the Supreme Court's decision in *Spangler, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of November, 1975, I served two copies of the foregoing "Amended Petition for Rehearing and Suggestion of Rehearing *En Banc*" upon the following counsel of record by United States mail, postage prepaid:

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/s/ DREW S. DAYS, III
Attorney for Plaintiffs-Appellants

APPENDIX C

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee
July 22, 1955

Statement of Policy of the Chattanooga Board of Education with Reference to the Decisions of the United States Supreme Court of May 17, 1954, and May 31, 1955, on the Subject of Desegregation in the Public Schools

The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools.

We have come to this decision after careful deliberation, believing that respect for the law of the land is essentially vital to each and every individual and to the welfare and happiness of all.

The Supreme Court decision does not require immediate and complete integration. Your school Board does not contemplate any immediate change in the operation of our schools.

The Supreme Court, in its decision of May 31, 1955, places the responsibility for solving this problem on the School Board. It requires that we act in "good faith"; that we make a "prompt and reasonable start," and that we comply at the "earliest practicable date." The decision likewise recognizes the need for "practical flexibility" in solving this situation.

The Supreme Court wisely directed the various boards of education carefully to examine their individual local situations before making any final decisions. Consequently, your School Board does not plan to integrate our public schools by September, 1955. Hasty action might well do more harm than good. The Supreme Court's decree recognized this fact.

Your School Board has a responsibility to the entire community, and we will do all we possibly can to discharge this responsibility fairly and justly to all the citizens of our community.

We do not know what the answers may be. We will counsel with the people of our community, seeking their advice and opinions in an atmosphere of earnest and calm deliberation, hoping thereby that as each decision is made, and as each step is taken, the community will accept our decisions and abide by them even though such decisions may be difficult for some to accept. Within the limits of human endurance and considering the many other demands upon the time of the members of your School Board, we will proceed as rapidly as possible to set up a plan to secure the widest possible participation of all of our citizens in finding the answers to this problem that will be fair and just to each and every person in our community. The Board will appoint a continuing interracial advisory committee and provide opportunities for other groups of citizens to present their points of view and proposals for consideration. As we think, plan and discuss together we will grow as a community in understanding and this process will produce ideas for action reflecting the combined wisdom of the community.

The Supreme Court of the United States has declared that "racial discrimination in public education is unconstitutional." It is our clear duty to comply with the ruling. Why? Because we are citizens of the United States of America. As American citizens we have been blessed with benefits far beyond those of any other people since the beginning of time. Being so blessed it is the obligation of every American citizen to uphold the Constitution of the United States – the very foundation of our way of life. We believe that law in its broad meaning protects, defends, and benefits each and every human being in this land of ours. Without law, and without respect for law, and the willingness to comply with law, our society could easily return to the jungle where the only deciding factor in the relationship of one human being with another becomes solely a question of brute force. The ideal of justice which pervades our way of life would then be lost, and the weak, whether physically weak or otherwise, would have no protection from those who are stronger than they.

Respect for the law and acceptance of the law is truly involved in the matter of compliance with the Supreme Court's decision. Should we have said that we would not comply with the decision, we would have been saying that each man is the sole judge of what laws he shall obey. If each man should become the sole judge of his actions, then the stabilizing influence of the law would be weakened and gradually fade away. We will not be a party to what is an attack upon the very foundation of our way of life and all that it has meant and all that it will mean to the welfare and happiness of all of us. We believe that this vital point is necessarily a part of our decision.

As we seek a solution we will make every effort to acquaint the entire community in conferences and through other media of communication of the varied aspects involved. This is not your Board's decision alone. It is a community decision. Although the Board will officially make the decision, each individual in our community must accept his responsibility in solving this question.

Our decision will have its influence and impact upon every phase of our community life. It is of the utmost importance that the great majority of the people accept our decision when finally made. This will be difficult for some – we fully realize this. The thoughtless action of a few could well present situations filled with danger. We know the community hopes and prays that such can be avoided. We know our people will make every effort to see that such is avoided.

It has taken more than seventy-five years to bring our public school system to its present degree of service to the children and the community. It is of the utmost importance that the public school system continue to make progress. It is important that we proceed to a solution of this problem in such a manner that the strength of the public school system is not weakened. In this endeavor we must always be mindful of each and every family, and ever protect the rights of all citizens.

We earnestly request and hope that the community will proceed in its thinking and its actions in a spirit guided by a sense of justice, respect for the law, awareness of the difficulties involved and guided by recognition of the necessity of reaching a fair and just solution. With God's help, this can be accomplished.

CHATTANOOGA BOARD OF EDUCATION

Mrs. J. B. (Sammie C.) Irvine, Secretary
Harry Allen, Commissioner and Chairman
R. E. Biggers
Alf J. Law, Jr.
W. D. Leber
Harry Miller
Raymond B. Witt, Jr.

APPENDIX D

CHATTANOOGA PUBLIC SCHOOLS
Chattanooga, Tennessee
November 15, 1955

Opening Statement by Chairman of the Committee of the Whole to Organizational Meeting of Interracial Advisory Committee

The Chattanooga Board of Education has asked each of you to give of your time and your wisdom as we seek a just solution to the problem of complying with the decisions of the United States Supreme Court holding that racial discrimination in the public schools is unconstitutional.

We deeply appreciate the spirit in which you have accepted this trying task, and we will be ever grateful to each of you for your proven interest and concern for public education and for the welfare of all the children who are now in the schools or who will in the future receive their formal education in the Chattanooga Public School System.

The table of contents in your handbook lists the following materials:

1. A copy of the Supreme Court decision of May, 1954.
2. A copy of the Court's decision of May, 1955.
3. Copies of three recent decisions on the question, one from the Federal District Court at Memphis, one by the Florida Supreme Court, and one by the highest court in Texas.
4. A copy of "What the Court Really Said."
5. A copy of the Board's orignal statement on the Court's decision issued July 22, 1955.
6. A copy of the Board's second statement on the question adopted October 12, 1955.
7. A copy of the statement I am in the process of reading.

A careful consideration of this material will provide a frame-

work of the area in which we will labor – guideposts as we attempt to uncover solutions to our problems.

In our original statement we clearly stated our intention to obey the law and comply with the Supreme Court's decision.

The *good faith* of this School Board, as we seek to comply with the Supreme Court ruling of May, 1955, is of the utmost importance. When we carefully consider the words of the Supreme Court, the importance of acting in good faith is apparent.

The Supreme Court declared the fundamental principle "that *racial discrimination* in public education is unconstitutional."

The Court spoke of "the complexities arising from the transition (Exhibit Two(2) – Page 2) to a system of public education freed of *racial discrimination*"; and said that "solution of varied local school problems" would be required; also that "school authorities have the primary responsibility of elucidating, assessing, and solving these problems."

The Court also said that courts will have to consider whether the action of school authorities constitutes good faith. By courts, they meant primarily the Federal District Court in each locality. The Court directed the Federal District judges to use "practical flexibility" in shaping their remedies and to consider the necessity for "adjusting and reconciling public and private needs."

The Supreme Court went on to say that the Negroes then before the court were entitled to admission to public schools as soon as practicable on a non-discriminatory basis. It spoke of eliminating obstacles "in a systematic and effective manner." It required a "prompt and reasonable start."

The Supreme Court required each school board to make a start toward compliance. They then placed on each school board the burden of proving how much time the public interest required for ending racial discrimination in the public schools.

The justices spoke of "a period of transition." They mentioned the fact that the district courts were to consider the adequacy of plans proposed by school boards.

The Court did not use the word "desegregation" a single time in its decree. It always spoke of discrimination based upon race alone.

This is a brief summary of the Court's decision. We have said, and we have said again, that we will comply with the Supreme Court's decision.

It is now our move – the next step is up to the School Board of the City of Chattanooga. First we must determine what we think the Supreme Court's decision means.

Widely varying interpretations may be given to the United States Supreme Court's two decisions. Words, singly and in groups, are capable of conveying different meaning to different people. Individually, and as a group, the School Board members have studied the decisions and exchanged viewpoints as to exactly what is the meaning of the decision. This analysis has been done with care, and we will continue to study the decisions in order more completely to understand them. In the last analysis we will comply with what we, as a group, believe to be the intent of the Supreme Court in declaring racial discrimination in the public schools unconstitutional.

In its original opinion of May, 1954, the Court had this to say – "Today, education is perhaps the most important function of state and local governments." There may well be some considerable risk that too hasty action in eliminating racial discrimination in the public schools could possibly result in the virtual destruction of the public school system. Certainly the Supreme Court would not destroy the most important function of local government in order to end racial discrimination.

The Court did not order immediate elimination of racial discrimination. It clearly recognized that time would be required. It did not impose a time limit. It placed on each school board the burden of proving how much time was required in its own community. Some may remove racial discrimination immediately without appreciable harm to public education. Some communities may require five years, some

ten years and some even longer. It will depend upon the peculiar and special circumstances found in each community.

The Court ordered us to: (1) elucidate, (2) to assess, (3) to solve. To elucidate means "to make clear, to throw light upon, to explain."

This is what your school board proposes to do with the help of those in the community who are interested. In so doing we intend to and we will act in good faith. It is important that our good faith be apparent to all. Good faith is a state of mind and consequently is difficult to prove. It can easily be a most important factor in our combined efforts to discover a just and fair solution to our common problem.

We firmly and sincerely believe with all our hearts that we have an equal responsibility to each and every child in the school system whether he or she may be white or colored. Our responsibility to the colored child is just as great as our responsibility to the white child. But this responsibility is no greater to the Negro than to the white. Should it develop that some step along the way toward elimination of racial discrimination would probably result in substantial injustice to a white child, your school board would need the wisdom of Solomon.

As we proceed to comply with the Supreme Court's decision as we understand it, we hope always to keep these points in mind.

1. We will act in good faith.

2. We will hear every group and each person who desires to discuss the problem with us within the limits of human endurance and so long as such persons are citizens of Chattanooga.

3. Ours is the responsibility of continuing to do our part to provide the best possible educational facilities for the children of our community.

4. Our responsibility to each child is equal. We will not benefit one child if, in so doing, we harm another child.

5. Your School Board does not presently know what the answer to the problem may be.

In assembling your committee we do not want to create the impression that we are seeking thereby to avoid the responsibility of making the decision. *We have not delegated this responsibility to your committee.* We cannot avoid making the decision as a board.

Then, you may ask, what is your function? We want as broad citizen participation in this decision as is possible. In the selection of your committee we have attempted to secure a broad representation from the entire community. We have selected you as persons of good will from the different sections of the community, from varied religious faiths, from varied economic status, hoping to secure a true cross section of our community. We have not ascertained in advance your opinions, again attempting to secure a group truly representative insofar as it is possible of the varied viewpoints in the community. As we proceed, please feel free to participate fully in the discussions, asking questions when you so desire and interposing your comments and suggestions. Your Board has never been over this road before, so it is impossible accurately to blueprint every aspect of your function as we progress.

As you sit with us you will gain a broadened understanding of the many vital aspects of the problem. You will hear the many varied opinions and viewpoints that will no doubt be expressed. Your depth of understanding will then assist the School Board members accurately and fairly to evaluate the condition. You then can assist to acquaint the community with the problem as it really is, removing doubts, clearing away half-truths and distortions and thereby aid the community to see the problem as it actually exists. We must first clearly define the problem as it actually exists before we can begin to evolve a solution. Your help will be invaluable, for truly, in the last analysis this is a community decision, not solely a decision for the school board. While we may well make the decision, each person in Chattanooga must then

decide whether or not to abide by our decision. We have no effective power to compel compliance. In the last analysis, it is a community decision.

Again may we tell you how deeply we appreciate your assistance. We urge you to participate fully. We know you will.

The problem is serious. We have faith that with God's help we can grow toward the right answers — a situation free from racial discrimination yet with equal justice to all.

APPENDIX E

The Chattanooga History
1955

Immediately following the decision of the Supreme Court in May, 1955, the defendant Board in a series of conferences considered its policy with regard to this decision. On July 22, 1955, an unequivocal decision to comply with the Supreme Court decision was publicly announced, followed the next day by a TV presentation in which all board members participated. The TV program was designed to further explain the policy decision arrived at and the reasoning and motivation that undergirded said policy decision.

Immediately thereafter the Board met in a series of conferences to decide upon and implement the first step in the compliance process. Believing that involvement of a substantial segment of the community was advisable in order to build a solid foundation for the radical change in the school system, the Board decided to form an Interracial Advisory Committee to function over a period of time as the Board attempted to meet the responsibility imposed upon it by the Supreme Court when it stated that school authorities were to have "the primary responsibility for elucidating, assisting and solving these problems; * *" referring to the varied school problems a solution of which would be required in order to fully implement

the constitutional principles enunciated by the Supreme Court with regard to racial discrimination.

The members of this committee were carefully selected by the Board representing a cross-section of the community. Invitation to participate was on an individual basis by requests from Board members.

On October 13, 1955, the decision to appoint such committee and the membership of the committee was released to the general public. Thereafter preparations were made for the organizational meeting of said committee which was held on November 15, 1955. This meeting was disrupted by the presence of citizens who were not members of the committee and terminated without accomplishing its purpose, ending in a near-riot.

By November of 1955 the pressure on the school board was intense and difficult to describe with any degree of adequacy or accuracy. After the above-mentioned meeting the Board met many times to evaluate the reaction of the community to the Board's decision to comply. Three major truths emerged from these discussions: (1) the community resistance to the Board's decision was of such intensity and so widespread, covering virtually all sectors of the white community, that to desegregate in any way within the near future would in all probability result in harm to the cause of public education to an unacceptable extent with the possible destruction of public education as an eventual outcome. The Board was convinced of the second truth (2) to the effect that because of the depth of the emotions evidenced, thoughtful and careful discussions of all aspects of the problem of compliance were impossible except in small groups carefully selected and with there being adequate time for give and take discussion. (3) The third truth that made itself evident was that the Board should address its efforts in the original instance toward securing the understanding and support of community leaders in the religious, professional and business fields.

The Board was aware of the fact that while it had the power to make a decision with regard to desegregation, its

power to compel acceptance of its decision within the school system and within the community did not exist. While the Board did not propose to yield to the community's resistance, it felt obligated to recognize the existence of this resistance, to evaluate the breadth and character thereof, to attempt to provide leadership that would contribute to the lessening of this resistance and to act in such a way with all of its plans and policy decision so as to achieve the maximum probability of the obtaining of compliance with a minimum detriment to the present and future quality of public education in Chattanooga.

The Elucidation Phase
1955-1960

This was the elucidating phase of the Board's actions and efforts over a period of time in many different directions. The Board was convinced that the Supreme Court was correct when it stated that "full implementation of these constitutional principles may require solution of varied local school problems." The Board was faced with problems of a nature completely foreign to its experience and its indivdual preparation. Being satisfied that every adult in the community had a viewpoint and a firm opinion with regard to desegregation, the Board also felt that the community must change its attitudes and that these attitudes could only change if the community faced the problem realistically. It is axiomatic that no problem can be solved until the dimensions of the problem are made clear to the persons who must in the final analysis provide the solution.

The Board had the *power* to place Negro and white children in the same classrooms but the reaction of the children in the classroom, the reaction of their parents and their older brothers and sisters, and their relatives and school personnel and the community in general to this radical change was a reaction over which the Board had no power or influence. The Board was convinced that if the responsible people in the community would face up to the problem and the chal-

lenge – if the community leaders could analyze the circumstances with wisdom and intelligence and good will – that the required change of attitude would occur. The Board was so convinced because as a result of its own careful evaluation of the decision and its impact upon the community and the nation, that the logical and inevitable outcome of a careful evaluative process would so bring the issues into proper focus that an attitude of compliance and a conviction of the necessity of compliance would be the natural outcome. The Board believed there could be no other outcome if reasonable men would apply their intelligence to the relative values involved.

The Board's elucidation effort perhaps was directed toward integration as distinguished from desegregation, and perhaps a responsibility that the Supreme Court did not place upon it. But the Board believed that the cause of public education required more than the mere placing of Negro and white children in the same classrooms, believing that if education were to take place, that the Negro children must be accepted by their classmates without hostility and with friendship, else the educational process for both races in such classrooms would suffer beyond repair and to the detriment of all.

The Board's elucidation process was an impossible undertaking. Yet an effort was made and the Board interpreted and discussed and reasoned and cajoled virtually every day in many different circumstances. The community's emotion was directed toward the Board for they were at hand and could be reached. The Board became the symbol of compliance and received the brunt of this deep emotional resentment that made itself felt throughout our community. The elucidation process was complex.

During the elucidation period the Board's actions were guided by commitment to certain principles. Each decision should be made in the light of its impact upon the quality of the educational process. That such was an acceptable principle is grounded upon the comment made by the Supreme Court in the First Brown Decision that –

"Today, education is perhaps the most important function of state and local government." (p. 493)

Of equal or superior dignity was the Board's obligation to comply with the Supreme Court's ruling. Also in the forefront of deliberations was that the Board was the legal representative of its community, charged with the responsibility of maintaining a system of public education as the community's agent, and as such, legally bound, in ordinary circumstances, to be responsive to the demonstrable, determinable will of the community. And finally, the Board kept in mind that compliance was considered by many to be solely a school problem, and that no other entity, public or private, had any legal responsibility to provide leadership toward recognition of the inevitability of compliance and the problems flowing therefrom.

There was an early recognition of the compelling necessity for strong, forthright, resolute community leadship. This was one of the salient goals of the elucidation program. There was agreement with Dr. Kenneth B. Clark's position taken in October of 1960 in his presidential address to the Society for the Psychological Study of Social Issues that "a clear and unequivocal statement of the policy of desegregation by leaders, prestige figures, and other authorities" is a factor of critical importance if the transition from segregation is to be effective. (Teachers College Record, Vol. 62, No. 1, Ostober 1960).

Recognizing such necessity was one thing. Securing this quality of leadership was another matter. There was no public pressure for such leadership. In fact, the pressure was in an opposite direction. The Board had no power to compel the acceptance of such leadership by any individuals or group. The Board had only the power of persuasion and intensive efforts were made toward this goal.

During this phase, defendants were cognizant of the fact that attitudes would change only after there occurred an intellectual acceptance of the fact that there was no acceptable

alternative to compliance. Every effort was made to drive this point home to the community but the voice of the Board was drowned out by the sounds of defiance. Only events in surrounding states and communities gradually evolved an awareness of inevitability.

From the experience of five years of exposure to the community reaction, from individual discussions, from meetings with groups, from many different sources defendant Board evolved certain judgments that it believed to be sound and capable of substantiation. As these judgments bear directly upon the Board's discharge of its legal responsibility and its stated commitment to act in good faith, it is believed that a recitation of these judgments is important.

1. A substantial majority of the white community honestly believed that the Supreme Court had made an incorrect and unfair decision.

2. Public support for the Board's position with regard to compliance from the white community was virtually nonexistent.

3. The public, in general, originally had virtually no meaningful comprehension of the vital relationship between compliance and the maintenance of law and order and respect for law as a foundation of our society nor the relationship of their individual attitudes and actions to the maintenance of law and order.

4. The Board was not equipped either with sufficient legal power or available manpower to discharge effectively its responsibility to make the problem clear to the community.

5. Deep-seated emotion absolutely prevented the vast majority of the white citizens from making a fair objective appraisal of the circumstances and their own individual responsibility. The circumstances demanded objective consideration; yet effective communication on this subject was possible only in small informal groups held in private where there existed previous personal relationships of a character that make for give and take.

6. The religious leadership of the community, in the early years, made their own individual surveys and soundings of their membership to whom they owed a primary responsibility of leadership and the vast majority then decided that the risks associated with forthright public approval of the Board's position of compliance were risks of such a nature that were unacceptable in the light of their respective positions in their own churches.

7. Objective discussions in a spirit of give and take coupled with the presence of good will, events, time and thought can and have resulted in basic changes in individual attitudes. The elucidation plan has produced tangible, provable affirmable results.

8. Each community has a personality peculiar to itself and to apply on an arbitrary basis a successful plan of desegregation in one community to another community is to disregard facts salient to peaceful desegregation.

9. Actual participation by citizens in a joint effort of decision-making provides a sound foundation for the eventual success of a radical change necessary to any community.

10. If a community will face its problems with its collective intelligence, with reality, and its other resources, it will attain a measure of maturity in the process.

11. Integration and desegregation are different words with different meaning applying to two distinct and separate processes and a recognition of this basic distinction is essential to an understanding of the many facets of the racial discrimination problem.

1960

The Chattanooga suit was initially filed on April 6, 1960, by James R. Mapp as father and next friend of James Jonathan Mapp and Deborah L'Tanya Mapp, minors, and others on their own behalf and on behalf of all other Negro children and their parents in the City of Chattanooga who were similarly situated and affected by the policy practice, custom, and

usage complained of. An injunction was requested against the operation of a compulsory bi-racial school system through the maintenance of a dual pattern of school zone lines based upon race and color, and against the assignment of pupils to schools on the basis of the race and color of the pupils. In the alternative, plaintiffs requested that CBE present a plan for reorganization of the system into a unitary non-racial school system providing for assignment of children on a non-racial basis.

The suit was filed under authority of 28 U.S.C. 1983 and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

CBE admitted the operation of a bi-racial school system and submitted that it had been, and was then, conducting a program of "elucidation" to prepare the community of Chattanooga for the initiation and carrying out of, and acceptance of, the student desegregation commanded by the *Brown* decision.

CBE represented that further time was needed to continue the elucidation responsibility so that student desegregation might have a reasonable chance of success with minimum harm to the quality of the educational opportunity as more of the community came to accept the requirements of the constitution.

On October 21, 1960, the district court granted the plaintiffs' motion for summary judgment and directed CBE to submit a plan of desegregation, and it was filed on December 20, 1960. This plan was disapproved and the Board was given sixty days within which to submit another plan. The Circuit Court of Appeals sustained the district court's order, 295 F.2d 617 (1961).

The filing of the complaint by plaintiffs on April 6, 1960, required that the Board shift its efforts and attention from working with the community to legal questions required by the defense of the lawsuit. An appeal was taken from the adverse summary judgment for the reason that the Board was of the opinion that the District Court interpreted the Supreme Court's decisions incorrectly. It was, and is, inconceivable

that the Supreme Court would issue a decision requiring such a radical alteration in a long-established social and educational tradition and pattern of living, and then make such decision effective instanter without providing school boards some reasonable period of time in which to make the required adjustments as to the manner in which they had operated their respective school systems.

Petitioners were convinced that it was possible for a situation to exist wherein a school board could, in good faith, begin a process of compliance that was short of physical desegregation of classrooms, and that such action could attain the dignity of "a prompt and reasonable start toward full compliance" within the meaning of such phrase as used by the United States Supreme Court. Until a District Court heard the facts pertinent to a particular school district, a summary judgment was not in order for if a board could prove a posture of compliance, a summary judgment against such board would be improper.

The Chattanooga Board of Education believed a judicial clarification of these points of law as to the practical effect of the Supreme Court's decisions was required if it was to discharge its own legal responsibility. The Board also believed such clarification could well be helpful in providing guidance to many other school boards faced with this dilemma. Such was the rationale, in brief, of the defendants decision to appeal from the adverse summary judgment.

Having lost its attempt to secure an interpretation of the Supreme Court's decision holding that an elucidation program could be found to be "a prompt and reasonable start," the defendant Board submitted a Plan of Desegregation to the Federal District Court in compliance with its directive on December 20, 1960. While such could have been construed as inconsistent with the appeal then in process, the Board was desirous of avoiding the impression that the sole purpose of the appeal was delay.

The plan was carefully conceived and designed through thorough examinations of all available facts and opinions

plus consideration of all known factors having any bearing upon the objectives of compliance, maintenance of quality education and a peaceful transition. After submission of the Plan, defendants undertook a major effort to be prepared to thoroughly and exhaustively explain and support the design and structure of the Chattanooga Plan of Desegregation at the hearing set for January 23, 1961.

1961

The District Court decided that a hearing was not necessary and tentatively rejected the Chattanooga Plan of Desegregation as submitted. An appeal was taken from this action by defendants on the ground that such action reflected a misunderstanding of the essence of the Second Brown Decision, frequently referred to as the implementation decision. The Board's reasoning was as follows: The Supreme Court had clearly –

1. recognized the paramount importance of public education;
2. placed a primary responsibility upon local school boards;
3. required school boards to discharge such responsibility in good faith, and
4. directed District Courts to consider whether or not good faith was present.

From this it must be the law that a finding of fact as to good faith or bad faith cannot be avoided. An exercise of judgment was required by seven individuals acting jointly, and good faith was the key to such judgment. In circumstances where deep seated feelings created harsh conflict, good faith was the deciding factor and a factor that should not be assumed, nor avoided, in fairness and justice to all concerned.

It is impossible to arrive at a finding of fact as to good faith unless the District judge hears the body, whose good faith is in question, explain why they did what they did – the facts, the opinions, the experiences, the values, the objectives, the reasons, the emotions. Without such proof a finding

of fact upon the presence or absence of good faith is without foundation and substance.

While the two appeals were pending before the Court of Appeals for the Sixth Circuit, defendants followed the steps outlined in the December 20 Desegregation Plan. Funds were secured for the house to house school census. Census takers were employed and trained. The census was taken and then the facts were transferred to the IBM machine accounting system. Single school zones were established based upon this information and other factors. PTA executive committees were met with in key areas in order to keep these leaders fully advised. Later meetings were held with each of the PTA groups of twenty white elementary schools wherein a status report was given by the superintendent or one of his assistants.

With this background the Board then proceeded to select the elementary schools to be desegregated, selecting nine white elementary schools affecting 84 Negro children in the first three grades and seven Negro schools affecting 189 white children. Notices of intent were requested for the sole purpose of providing the school officials with the information as to which classrooms would be desegregated. This was a necessary requisite to pinpoint the school communities and classrooms for which adequate desegregation preparation must be designed and effected. Such preparation was planned and commenced.

This course of action was required because the December 20 Plan was the ultimate as to the defendants best judgment, therefore action consistent with the plan was dictated by moral and legal considerations.

At this stage of the proceedings the defendants present position and judgment was that:

1. Peaceful desegregation is of paramount importance; therefore, the Board should submit and support a Desegregation Plan that has the maximum probability of resulting in peaceful desegregation, consistent with philosophy expressed in Supreme Court's decisions in the Brown Cases.

2. A peaceful desegregation process is a requisite for maintenance of quality educational program both in the near future and over a long period of time.

3. While the law requires only the system be desegregated, the maintenance of quality education requires that desegregated classrooms be integrated insofar as is possible for education occurs only where good classroom environment exists free of tension and conflict.

4. School communities vary in their degree of readiness to accept and support a measure of desegregation.

5. Preparation of overall community for peaceful desegregation, compliance with law, active support of law and order, are essential to peaceful desegregation and directly related to maintenance of quality education.

6. Preparation of school communities on individual basis has similar status.

7. Preparation of individual classrooms to be desegregated is required.

8. Preparation of school personnel is necessary.

9. All such preparation requires time and has no bearing on delay for sake of delay.

10. Rights of Negro children will be of little validity without classroom integration.

11. Gradualism as a procedure for compliance is called for by the Supreme Court, Appellate Courts and acquiesced in, inferentially by many policy decisions of N.A.A.C.P. Gradualism is the law.

Why is peaceful desegregation of such paramount importance. A demonstration of peaceful desegregation will remove uncertainties and emotionalism associated with the human fear of the unknown and the untried. It will give the community confidence in itself and its capacity to solve its own problems. It will avoid the scars that inevitably flow from turmoil and conflict. It will engender confidence in the maturity of public education with future benefits of importance.

Community preparation for desegregation was a long-term goal and effort of defendants. Since the summer of 1961,

responsible leadership came forward on a voluntary basis. A citizens steering committee was formed. The Mayor of Chattanooga, P. R. Olgiati, and the Judge of Hamilton County, Chester Frost, appointed the chairman. It represented a voluntary acceptance of responsibility by top community leadership. The preliminary planning was done. Committee responsibility was assigned and accepted. The approach was to the total community. Broad community participation was planned and partially implemented. The goal of this committee was the maintenance of law and order in the desegregation process.

1962

The superintendent and his staff completed the plans for the preparation of school personnel. A principals meeting was held January 3, 1962, to outline the detailed program of future preparation of principals, teachers, students and parents.

With regard to school community preparation substantial progress was made, including meetings by the superintendent with student leaders from selected schools involving assistant superintendents, principals and guidance personnel. Further meetings were had with P.T.A. leaders, homeroom mothers, white and Negro parents of children in classrooms affected in order to encourage acceptance of responsibilty in each school and classroom.

THE 1962 HEARING

A hearing was held on February 1 and 2, 1962 after which the District Court approved the desegregation plan in part. Said plan involved the desegregation of sixteen selected elementary schools in September of 1962 in grades 1, 2, and 3, followed by desegregation of all four grades of all elementary schools in September 1963 and the remaining elementary grades in 1964. The plan proposed to desegregate the first year of junior high in 1965, the remaining junor high grades in 1966, first year senior high in 1967, the remaining high

school grades in 1968 and the Chattanooga Technical Institute in 1969. "All parties appeared to find this broad scheme of desegregation acceptable." An appeal was taken by both parties with reference to specific portions of the District Court's orders and decrees with reference to transfer policy and the interim unavailability of certain special courses to Negroes. Such plan was approved upon appeal with the exception of technical and vocational courses and the case was remanded for further proceedngs with respect to them.

Under date March 29, 1965, the plaintiffs filed a Motion for Further Relief seekng acceleration of desegregation so that complete desegregation would be effected by September 1965 and for teacher and pupil assignments to be made *"wthout regard to race"* and that all racial classifications be eliminated from the operation of the public school system. The District Court granted the relief requested requiring the complete elimination of dual zones in all grades by September 1966. The Court denied relief on the issue concerning the faculty desegregation. The Court of Appeals, 373 F.2d 75 (2/27/67), affirmed the judgment of the District Court with the exception of the issue of faculty assignments as *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965) having been decided since the District Court decision was filed.

PROCEEDINGS SINCE 2/27/1967 DECISION OF APPELLATE COURT

On March 29, 1967 the District Court entered an order finding that the single question left for decision was faculty assignment. On September 12, 1967 the defendant proposed an offer of judgment regarding the faculty issue. Such was neither accepted nor specifically rejected by plaintiffs, and on December 31, 1968, an additional Motion for Further Relief was filed. Then again on November 14, 1969 another Motion for Further Relief was filed. On November 23, 1970 plantiffs filed a Motion For Summary Judgment contending that the desegregation plan had proven ineffective to accom-

plish its purpose, that is the establishment of a unitary school system in the City of Chattanooga, such motion apparently being based upon *Green* v. *School Board of New Kent County*, 391 U.S. 430, 437-8 (1968) which charged de jure school boards with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

The District Court denied the Motion for Summary Judgmen (2/19/71) but set the case for evidentiary hearing and specified the issues for trial placing the burden of proof upon the Board to show that its actions met the obligation to establish a unitary school system.

As invited by the District Court, the Board responded:

> "If the affirmative duty referred to by the Supreme Court does encompass affirmative decisions by the Board based solely upon race, and coupled with compulsion by the Board in order to increase the number of whites in all-black high schools and the number of blacks in formerly all-white high schools, then defendant Board would not have met its affirmative responsibility to establish a unitary school system when this concept is so interpreted as to require a recognition of race." (3/8/71) Appendix in Sixth Circuit Nos. 71-2006, -2007, p. 87.

1971 EVIDENTIARY HEARINGS

The evidentiary hearing was held on April 14, 1971, May 11-19, 1971 inclusive. Following this hearing the District Court Judge found that defendant had not complied with the constitutional responsibility to establish a unitary school system and ordered a new plan of desegregation to "maximize integration" to be submitted. On June 16, 1971 said plan was filed incorporating racial gerrymandering of zones and the assignment (and transportation) of students, faculty and supervisory personnel upon the basis of race in order to increase both student and faculty desegregation. A hearing was held on July 16, 1971 on the acceptability of the Board's amended plan along with the plaintiffs' objections thereto.

On July 26, 1971 the Court approved all substantive portions of defendant's amended plan, 329 F. Supp. 1374, except the high school portion and ordered the plan implemented to the extent possible by September 1971. The plaintiffs appealed objecting to the inadequate degree of student desegregation (racial imbalance) to be accomplished by the plan as approved. Objections centered on those elementary schools where the racial proportion would be less than thirty percent of either black children or white children. The schools included were Barger, 20% black, Carpenter, 14% white; Long, 16% black; Rivermont, 12% black; Sunnyside, 15% black. The District Court had this to say:

> "With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board." 329 F. Supp. (p. 1382).

As was found by the District Court, all of the remaining twenty-seven elementary schools under the plan "will have racial ratios of not less than 30% nor more than 70% of any race in each school." (p. 1383).

The Court went on to say:

> "To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency." (p. 1383).

The treatment of the junior high schools was substantially in the same manner as that of the elementary schools. Only Hardy, 27% white; Dalewood, 29% black and Long, 15% black deviated from the 30-70 percent ratio. At page 1384 the Court said:

> "In the light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga Junior High Schools would eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision."

As to the high schools, zoning was introduced for the first time in the Chattanooga system in order to achieve greater student desegregation with the plan proposing to make Brainerd High School 32 percent black, 68 percent white and Chattanooga High 44 percent black and 56 percent white with the formerly all-black high schools, Howard and Riverside, being 75 percent black, 25 percent white. The Court was concerned as to whether the students and the statistical data upon which the defendant's plan was based would correspond with actual experience. Thus the Court gave tentative approval only to the desegregation plan at the high school level.

The plan proposed limited transportation for elementary and junior high school students because of pairing, clustering,

and racial assignment of students. With reference to transportation the Court's decision stated as follows:

> "The defendants will accordingly be permitted to implement such portions of its elementary and junior high school plans as may be feasible with the transportation facilities reasonably available to it at the commencement of the September term of school, and will be permitted to delay the implementation of any remaining portions of the said student assignment plans in the elementary and/or junior high school until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, and until such facilities can be placed in use with safety and with a minimum interruption of the educational program. As soon as the defendants can formalize their plans in this regard, and in no event later than within thirty days, the defendant will advise the court of their proposed implementation schedule in accordance with the foregoing." (p. 1388).

By order of August 5, 1971 the District Court permitted delay as to transportation "until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, . . ." (Appendix in Sixth Circuit Nos. 71-2006, 2007, Vol. I, p. 215).

PROCEEDINGS IN 1972

A proceeding in state court resulted in an injunction against the Commission of the City of Chattanooga from providing any public funds to transport school students for the purpose of achieving racial balance. On January 24, 1972 defendant filed a "Status Report on Amended Plan of Desegregation and Motion for Further Instructions" bringing the state court decision and injunction to the attention of the Federal District Court. Further proceedings were had at the District Court level as a result, but such proceedings are not germane to the

present appeal, except that in the District Court Opinion filed on February 4, 1972, the District Court, 341 F. Supp. 193, 200, directed that its Order of August 5, 1971 be fully implemented no later than the fall term of school in 1972, unless otherwise stated in the United States Court of Appeals.

On May 18, 1972 defendant filed a report as required by the Opinion of February 4, 1972 with reference to "any racial imbalance remaining in the four general purpose high schools." The report referred to a statiscal report entitled "Tenth Day of School Enrollment Report 1971-72 School Term" dated September 23, 1971 and filed with the Court on September 24, 1971 coupled with a supplementary statistical analysis dated March 17, 1972, and entitled "Summary Analysis of Senior High Schools 1971-72 Enrollment of 1970-71 Pupils Projected to Enroll."

Oral argument before this Court in Nos. 71-2006, 2007 took place on June 5, 1972.

Defendant filed a Motion for a Limited Stay on June 23, 1972 pursuant to Section 803 "Provision Relating to Court Appeals, Title 8 — General Provisions Relating to the Assignment of Transportation of Students" of Education Amendments of 1972 as passed by the Senate on May 24, 1972, the House of Representatives on June 8, 1972, and as signed by the President of the United States on June 23, 1972. Following several delays requested by the attorney for the plaintiffs, a hearing was held on said motion and other pending motions on July 27, 1972. Lengthy briefs were filed by the parties and on August 11, 1972, the District Court granted defendant's Motion to Stay, but limited to "only of such portions of the previous orders of this Court as necessarily involve the transportation of elementary or junior high school students, such stay being subject to the further orders of this Court." Plaintiffs filed Notice of Appeal from said order on August 17, 1972.

A report entitled "Submission of Student Desegregation Statistics by Defendant as of the Tenth Day of School, 1972-73, U. S. Department of Health, Education, and Welfare School

System Summary Report" and explanatory material was filed with the District Court under date December 4, 1972 containing the statistical facts evidencing the response of students to the desegregation plans in the second year of partial implementation.

On December 14, 1972 oral argument took place before this Court in Cincinnati sitting en banc.

PROCEEDINGS IN 1973

Oral arguments before the Supreme Court of the United States in the Richmond case (*Bradley, supra*) took place on April 23, 1973 and this Court's en banc decision affirming the District Court was filed on April 30, 1973. The following appeared in said decision:

> "The Board of Education has filed a supplemental record in this court containing statistics said to reflect changes which have occurred after the decisions of the District Court. We decline to consider these statistics in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We re-emphasize the holding of this Court in *Kelley* v. *Metropolitan Board of Education* of *Nashville* and *Davidson County, supra*:
>
> > 'Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances.'"
> > 463 F. 2d at 745-46.

Under date May 31, 1973, counsel for defendant submitted an opinion in letter form to defendant entitled "Suggested Procedure for Board Analysis of Proposed Amendments to Plan of Desegregation and Educational Reasons Therefor." (Tr. 828, Exhibit 18) The defendant was reminded that in *Brown II* "the primary responsibility for elucidating, assessing, and solving these problems" was clearly placed upon school authorities, the clear implication being that initiation of solutions was the responsibility of school authorities and not the

District Court. The thrust of the opinion was to advise defendant as to the steps needed to be taken if the Board was to meet its constitutional obligation under *Brown I* and *II* in seeking to find a workable solution to compensate for the dual school systems operated prior to September of 1963-66 in Chattanooga.

The above recommendation by counsel was considered at a meeting of the Chattanooga Board of Education on June 13, 1973 and the unanimous decision was made to accept said recommendation. Subsequent board meetings were held on June 19, 1973, June 26, 1973, July 3, 1973, July 9, 1973 and July 11, 1973 on which date the proposed adjustments to the June 16, 1971 plan of desegregation were unanimously agreed upon for presentation to the District Court. There followed a letter to Avon N. Williams, legal counsel for plaintiffs, requesting a conference in order for defendant to present the proposed adjustments and their supporting rationale in an informal conference. On July 20, 1973, the Motion for Further Relief: To Adjust Amended Plan of Desegregation as Filed June 16, 1971, and Brief in Support of Said Motion for Further Relief was filed. Pursuant to motion filed by plaintiffs, an order was entered on July 30, 1973 extending time for plaintiffs to answer defendant Board's motion to adjust plan to August 10, 1973. On August 14, 1973 a conference with counsel present was held with the District Court in chambers. By order dated August 16, 1973, an evidentiary hearing was set for September 10, 1973. Then on August 22, 1973 a motion to postpone hearing was filed by the plaintiffs which was granted and an order entered on August 28, 1973 setting a date for the hearing on October 1. The rehearing was reset for October 2, 1973 on September 14, 1973. The evidentiary hearing was held on October 2, 3, 4, 5, 9, 10 and 11 and thereafter defendant filed a memorandum in support of its motion on October 17 and a supplemental brief on October 26. A Memorandum Opinion denying defendant's motion was filed on November 16, 1973 followed by final order on December 18, 1973.

Plaintiffs filed its motion to amend Memorandum Opinion of November 16, 1973 on December 26, 1973 and for new trial and for further relief. Thereafter on January 7, 1974 said motion was supplanted by an amended motion to amend for a new trial and further relief.

While the above events were taking place at the district court level, CBE had filed a Petition for Writ of Certiorari with this Court, said case being docketed on July 25, 1973. Such petition was from the en banc affirmance by the Court of Appeals for the Sixth Circuit entered on April 30, 1973. 477 F.2d 851 (1973). Certiorari was denied by this Court on November 12, 1973, 414 U.S. 1022.

PROCEEDINGS IN 1974

On June 20, 1974, Judge Wilson filed a Memorandum on Pending Motions finding that plaintiffs' Motion and Amended Motion for a New Trial or for Further Relief of January 7, 1974 was without merit and should be denied. On July 12, 1974 the plaintiffs' notice of appeal (No. 74-2100) from Judge Wilson's denial of the Motion as set forth above was filed. On July 22, 1974 CBE's notice of appeal (No. 74-2101) from the order of December 18, 1973 was filed. The appellate oral argument was on April 18, 1975 with the opinion being rendered on October 20, 1975. The plaintiffs' "Motion for Rehearing or Rehearing En Banc" was filed on November 4, 1975 with an "Amended Petition for Rehearing and Suggestion of Rehearing En Banc" being filed on November 24, 1975 pursuant to a grant of extension of time in which to file having been noted on November 4, 1975.

Plaintiffs' petition for a rehearing in No. 74-2100 called the attention of the court of appeals to the fact that this Court had granted Certiorari on November 11, 1975 in *Pasadena City Board of Education, et al.* v. *Spangler, et al. and United States,* No. 75-164, going on to request a delay in action upon such petition to rehear until *Pasadena,* supra, was decided.